In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1515

AMITY FABRICS, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Customs and Patent Appeals (Pet. App. pp. 15–24) is not yet reported. The opinion of the Customs Court (Pet. App. pp. 25–37) is reported at 305 F. Supp. 4.

JURISDICTION

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QUESTION PRESENTED

Whether the Tariff Commission was required by the Tariff Classification Act of 1962 to provide an *eo nomine* classification for "waterproof cloth" in the Tariff Schedules of the United States.

STATUTES INVOLVED

1. Section 101 of the Tariff Classification Act of 1962, 76 Stat. 72, provides in relevant part:

> (a) The Tariff Act of 1930, as amended, is amended by striking out titles I and II (19 U.S.C. 1001 and 1201) and, subject to subsection (b) of this section and to sections 102 and 103 of this Act, by substituting in lieu thereof a new title I entitled "Title I—Tariff Schedules of the United States".
>
> (b) Such new title I (hereinafter in this Act referred to as the "Tariff Schedules of the United States") shall consist of—
>
> (1) the general headnotes and rules of interpretation;
>
> (2) schedules 1 to 8, inclusive; and
>
> (3) the appendix to the tariff schedules; all as set forth in the report of the United States Tariff Commission (hereinafter in this Act referred to as the "Commission") entitled "Tariff Classification Study, Proposed Revised Tariff Schedules of the United States", dated November 15, 1960, as changed by the "First Supplemental Report" (January, 1962); and
>
> (4) subject to subsection (c), such changes in the provisions identified in paragraphs (1), (2), and (3) of this subsection as the Commission decides—

(A) are necessary to reflect changes in tariff treatment made by statute or under authority of law, arising either before the date of the enactment of this Act or on or after such date of enactment and before the date on which the Tariff Schedules of the United States is published pursuant to subsection (d), or

(B) are otherwise necessary.

In its determinations under this paragraph, the Commission shall apply the standards it applied in its report of November 15, 1960, referred to above.

(c)(1) The Commission shall include the changes provided for in subsection (b)(4), together with the reasons therefor, in one or more supplemental reports which shall be promptly published and submitted to the President and the Congress. The delivery to the Senate and to the House of Representatives shall be made on the same day. In its supplemental reports the Commission shall include written views submitted to the Commission, and testimony before the Commission, with respect to provisions of the proposed Tariff Schedules of the United States, together with the comments of the Commission on such views and testimony.

(2)(A) No change submitted pursuant to the authority contained in subsection (b) (4)(B) shall become effective unless, following the date on which the supplemental report containing such change was submitted to the Congress and before the date on which the Tariff Schedules of the United States is published pursuant to subsection (d), a period of 60 calendar days of continuous session of the Congress has elapsed.

(B) For purposes of subparagraph (A)—

(i) continuity of session shall be considered as broken only by an adjournment of the Congress sine die; but

(ii) in the computation of the 60-day period there shall be excluded the days on which either House is not in session because of an adjournment of more than 3 days to a day certain.

(3) No changes included by the Commission in any supplemental report submitted after the date of the enactment of this Act shall become effective unless included in the Tariff Schedules of the United States as published pursuant to subsection (d).

(d) At the earliest practicable date before the date of the proclamation of the President provided for by section 102, the President shall cause the Tariff Schedules of the United States to be published.

2. Section 2 of Public Law 86–795, 74 Stat. 1052 provided in relevant part:

> In order to insure a correct interpretation of the provision "waterproof cloth" in paragraph 907, Tariff Act of 1930, it is hereby declared that it was and is the true intent and meaning of paragraph 907 to limit the term "waterproof", when applied to cloth, "wholly or in chief value of cotton or other vegetable fiber, whether or not in part of India rubber", to cloths of a kind generally used in the manufacture of articles which are designed to afford protection against water to the extent expected in raincoats, protection sheeting, dress shields, umbrellas, and similar articles. Even when cloth possesses water repelling characteristics, it is

not classifiable as waterproof cloth within the meaning of paragraph 907, Tariff Act of 1930, unless it is of a kind generally used in the manufacture of articles of the class specified in the preceding sentence."

STATEMENT

1. On August 31, 1963, the new Tariff Schedules of the United States (TSUS), which are the subject of the instant litigation, became effective. Prior to that date, paragraph 907 of the Tariff Act of 1930 (19 U.S.C. (1958 ed.) 1001), had provided an 11 percent *ad valorem* duty for "waterproof cloth, wholly or in chief value of cotton or other vegetable fiber * * *."[1] This language had been construed by the Court of Customs and Patent Appeals to cover all cloth which had in fact been waterproofed, regardless of its ultimate use. *United States* v. *D. H. Grant & Co.*, 47 C.C.P.A. 20, C.A.D. 723. In direct response to the *Grant* decision, however, Congress had enacted Public Law 86–795, which explicitly restricted the classification under paragraph 907 to cloth of a kind generally used in the manufacture of articles designed to afford protection against water.

This is where matters stood until enactment of the Tariff Classification Act of 1962, Public Law 87–456. That statute repealed the Tariff Act of 1930 and

[1] The original rate of duty under this provision was "40 per centum ad valorem," but this was reduced, by trade agreements, to 11 percent. Cotton cloth not qualifying for classification under paragraph 907 was dutiable under paragraphs 904(c) and (d), which provided a significantly higher rate of duty on a sliding scale for "[c]otton cloth, printed, dyed or colored * * *."

adopted the new TSUS, as devised by the Tariff Commission pursuant to the Customs Simplification Act of 1954 (P.L. 83–768).[2] Although the Customs Simplification Act directed the Tariff Commission to retain existing rates of duty where possible, the Commission was authorized to make changes necessary to eliminate anomalies and illogical results in the tariff schedules and to simplify the determination and application of tariff classifications (Sections 101(a)(2) and (3), 68 Stat. 1136).

The Tariff Classification Act of 1962 provided a mechanism whereby the Tariff Commission was to incorporate directly into the new TSUS statutory, judicial, and authoritative administrative changes made subsequent to its earlier study, without the need for further Congressional action (Section 101(b)(4), 76 Stat. 73). Where the Commission wished to make other changes, it was required first to hold hearings and then to submit a report to Congress. The proposed changes could become effective only after they had been before Congress for 60 days (Section 101(c), 76 Stat. 73).

With respect to waterproof cloth, the Commission determined that it was not desirable or feasible to establish a separate category for that item, but that waterproof cloth should be subsumed within the category for coated and filled fabrics (the technique used for waterproofing). To effectuate this conclusion, the

[2] This Act authorized the Commission to study all the provisions of the customs laws of the United States and to compile a revision and consolidation of them (Section 101(a), 68 Stat. 1136).

Commission provided in item 355.65 of the TSUS a rate of 11 percent *ad valorem* on woven or knit, coated or filled fabrics made of vegetable fibers, with the exception of pile or tufted fabrics. It explained its action to Congress in the *Tariff Classification Study,* 1960–1961, Vol. 5, p. 134. This change was adopted when the Tariff Classification Act of 1962 was passed, and became effective on August 31, 1963, pursuant to Presidential Proclamation No. 3548 (1963).

2. On September 5, 1963, petitioner imported a shipment of waterproof cotton pile cloth, which, not qualifying for classification under item 355.65, was classified under item 346.24 of the TSUS as imported twill back velveteen pile fabric, dutiable at the rate of 22.5 percent *ad valorem.* Petitioner filed a protest in the United States Customs Court, contending that the Tariff Commission disregarded Section 101(b)(4) of the Tariff Classification Act of 1962 in failing to include an *eo nomine* classification for "waterproof cloth," which classification petitioner contended was mandated by Public Law 86–795. Therefore, according to petitioner, paragraph 907 of the Tariff Act of 1930 remained in force even after the enactment of the Tariff Classification Act of 1962, and governed the assessment of duty on the imported fabric. Alternatively, petitioner claimed that duty should be assessed at the item 355.65 rate for coated and filled fabric or the merchandise should be allowed to enter duty free. The Customs Court upheld the administrative classification and its judgment was affirmed by the Court of Customs and Patent Appeals.

ARGUMENT

Both of the customs tribunals properly rejected petitioner's attack upon the classification of its merchandise. Petitioner does not dispute that, since its cloth is of pile fabric, it is excluded from classification under item 355.65 of the TSUS by the express terms of that item. Nor does it seriously challenge that the cloth is twill back velveteen pile fabric within the meaning of item 346.24. Rather, petitioner insists that the Tariff Commission was required to establish a separate classification for waterproof cloth in the TSUS and to provide a rate of duty for such cloth not exceeding the 11 percent rate contained in former paragraph 907 of the Tariff Act of 1930. In support of this view, petitioner relies exclusively upon P.L. 86–795, enacted in 1960, which provided that the term "waterproof cloth" in paragraph 907 of the 1930 Act (which was then still in effect) should be construed as applying only to cloth of a kind generally used in articles designed to afford protection against water.

For two independent reasons, petitioner's position is without merit. First, P.L. 86–795 did not purport to require the continued existence of a separate classification for waterproof cloth; the sole purpose of that statute was to insure that, so long as such a classification was in effect, its application would be limited to certain kinds of waterproof cloth. Second, in the formulation of the TSUS, the Tariff Commission was expressly authorized to make such changes in existing

tariffs on imported merchandise as it considered necessary. The contention that this authority constituted an unconstitutional delegation of legislative power ignores the uncontested fact that such changes had to be placed before the Congress for adoption prior to becoming effective.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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